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No. 84-1068 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARY JANE STUBBS, ADMINISTRATRIX OF THE ESTATE OF DAWN MAXINE STUBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, the administratrix of the estate of Dawn Maxine Stubbs, an Army private, brought this suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, contending that sexual harassment by an Army drill sergeant caused the suicide of Private Stubbs. Petitioner contends that the courts below erred in holding that her claim is barred by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which prohibits FTCA suits by servicemembers for alleged torts incident to military service.

1. a. Petitioner alleges that while Private Stubbs was stationed at Fort Leonard Wood, Missouri, Army Drill Sergeant Sookdeo ordered her to a latrine for what she believed to be cleaning duties. Sgt. Sookdeo then allegedly confronted Private Stubbs, demanded sex from her in exchange for an easier tour of duty, and improperly

touched her. These advances were rebuffed by Private Stubbs, who left Fort Wood the next morning on holiday leave. This incident, coupled with a prior rape suffered by Private Stubbs in 1979, allegedly caused Private Stubbs severe anxiety leading to her suicide on the day she was due to return to Fort Wood. Pet. App. 3a-4a.

Petitioner then brought this action in the United States District Court for the Eastern District of Arkansas.[1] She alleged that the government was liable not only for Sergeant Sookdeo's actions but because the Army knew of sexual harassment at Fort Wood and "did nothing to prevent it" (Pet. App. 8a). Petitioner also alleged that "the military establishment" at Fort Wood "would have resisted any claims of sexual harassment leveled at its noncommissioned officers and would have labeled Stubbs a troublemaker had she complained about the incident"; in this way, the complaint alleged, the Army created "the atmosphere which ultimately led to Stubbs' suicide" (*ibid.*).[2]

The district court, relying on *Feres*, dismissed the complaint (Pet. App. 10a-26a). It ruled that "allowing this suit in federal court would permit the civilian intervention in military relationships that the *Feres* doctrine was created to prevent" (*id.* at 23a).

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[1]In addition to suing the government under the FTCA, petitioner also sued Sergeant Sookdeo in his individual capacity. This claim was dismissed by the district court for lack of in personam jurisdiction. Pet. App. 26a-30a. Petitioner did not appeal this dismissal to the court of appeals. See Pet. 8 n.1.

[2]Specifically, petitioner's complaint alleged that "[t]he Army has knowledge of sexual harassment of female enlisted personnel, but it has taken no positive steps to prevent it or to enable them to make effective complaints" (Complaint para. 18) and that "[t]he military establishment protects its own, and an allegation of sexual harassment made by decedent would have been met with official resistance, been rebuffed, and resulted in her being labeled a 'troublemaker' throughout her tour of duty in the Army" (Complaint para. 19).

b. The court of appeals affirmed (Pet. App. 1a-9a; 744 F.2d 58). The court noted that "[w]hile the sexual harassment certainly served no military purpose" (Pet. App. 7a), both Private Stubbs and Sgt. Sookdeo were, at the time of the incident, on duty on a military post, and the alleged misconduct involved "the threat of military discipline to extort sexual favors from Stubbs" (*id.* at 6a-7a). For these reasons, the court concluded, the government had shown the necessary relationship between the incident and Stubbs's military service to bring petitioner's claim within the *Feres* doctrine (*id.* at 7a). The court of appeals noted that "[t]he trial [of petitioner's claim] would undoubtedly question the interaction between an officer and his subordinate" as well as "directly question the disciplinary decisions of superior officers in failing to prevent the incident and in creating a situation where enlisted personnel are discouraged from making complaints" (*id.* at 8a-9a). The court ruled that "[a]ll of these inquiries go to the heart of military decision-making and discipline, and thus are barred by *Feres*" (*id.* at 9a).

2. The decision of the court of appeals is plainly correct. As this Court has frequently noted, the principal basis of the *Feres* doctrine is the need to prevent judicial interference with the "peculiar and special relationship of the soldier to his superiors" and to avoid "the effects of the maintenance of [servicemembers' FTCA suits for injuries incident to military service] on discipline" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)). See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 299 (1983); *Stencel Aero Engineeering Corp.* v. *United States*, 431 U.S. 666, 671 (1977); *United States* v. *Muniz*, 374 U.S. 150, 162 (1963). The Court has further explained that such suits are barred because "[t]he trial would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."

Stencel Aero Engineering Corp., 431 U.S. at 673. As Justice Marshall has stated, "[t]he basis of *Feres* was the Court's concern with the disruption of '* * * [the] relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court." *Id.* at 676 (dissenting opinion) (citation omitted).

Petitioner's claim directly implicates these concerns. Petitioner is asserting that the statements and actions of a military superior toward an enlisted servicemember, while both were on duty, improperly harassed the servicemember for illegitimate personal reasons. This is precisely the kind of claim that *Feres* was intended to bar; without prejudging the merit of petitioner's particular claim, it is entirely clear that if claims like petitioner's were allowed, any servicemember who believed that he was injured because his military superior issued an order for improper personal reasons, or otherwise verbally harassed him, could bring suit challenging the order. This is the very danger that *Feres* was designed to avert.[3]

In addition, petitioner has challenged the decisions of supervisory military officials at Fort Wood, asserting that they did not adequately seek to eliminate sexual harassment and that they created the impression that they would have retaliated against any servicemember who complained of sexual harassment. These claims, also, implicate policies at the core of *Feres*; they challenge "complex, subtle, and

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[3]Petitioner also appears to suggest (*e.g.*, Pet. 13-14, 17) that the *Feres* doctrine itself should be reconsidered. But this Court has twice recently reaffirmed *Feres* (*Chappell* v. *Wallace, supra*; *Stencel Aero Engineering Corp.* v. *United States, supra*), and Congress is aware of the 35-year old *Feres* doctrine and has deliberately chosen not to overrule it. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972). See generally H.R. Rep. 97-384, 97th Cong., 1st Sess. Pt. I, at 5 (1981); *The Feres Doctrine As It Relates To Private Claims: Hearings Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

professional decisions as to the composition, training, * * * and control of a military force" — decisions about which this Court has said: "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); see also *Chappell*, 462 U.S. at 301-302; *Rostker* v. *Goldberg*, 453 U.S. 57, 65-66 (1981).[4]

Petitioner's principal rejoinder (see Pet. 16-18) appears to be that *Feres* precludes only suits alleging negligence, not suits alleging intentional torts. But petitioner cites no decision supporting this contention; the courts of appeals have consistently held that the *Feres* doctrine bars servicemembers' suits alleging intentional torts incident to military

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[4]Petitioner sometimes appears to suggest (see, *e.g.*, Pet. 14, 20-21) that *Feres* does not bar her claim because sexual harassment plays no proper role in military life. But racial discrimination is no less repugnant to the proper operation of the military, and in *Chappell* v. *Wallace, supra*, the Court unanimously held that the principles of *Feres* precluded a damages action by servicemembers against their superior officers alleging racial discrimination. In general, a tort will seldom, if ever, play a legitimate role in military life; thus, if petitioner's reasoning were accepted, the *Feres* doctrine would be wholly abrogated. The question under *Feres* is whether a *claim* of wrongful conduct presents the dangers of judicial interference in military discipline that *Feres* is designed to prevent. It is clear that claims of sexual harassment present such dangers.

We of course agree with petitioner that sexual harassment is wholly inappropriate and inexcusable in the military. But the remedy for sexual harassment in the military lies not in an FTCA action against the government but in other remedial mechanisms that would have been available to Private Stubbs. She could have filed a complaint with an Army Equal Employment Opportunity staff office or with the Inspector General at Fort Wood; she could have initiated the "chain of command" remedy provided by Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938 (see *Chappell*, 462 U.S. at 302-303); she could have preferred criminal charges against Sgt. Sookdeo; and, in her particular unit, we are advised by the Army that she could have approached a female drill sergeant with her complaint. We are also advised that the Army conducted two separate investigations of the alleged incident that is the basis of this suit.

service. See *Stanley* v. *CIA*, 639 F.2d 1146, 1152 (5th Cir. 1981) (citing cases). See also *Chappell* v. *Wallace, supra.* This Court has previously declined to consider the contention that *Feres* does not bar suits alleging intentional torts (*Lewis* v. *United States*, cert. denied, 457 U.S. 1133 (1982)); as we explained in our memorandum in opposition in *Lewis*,[5] the policies underlying the *Feres* doctrine — the need to avoid the disruption of military discipline and the second-guessing of military decisions — apply even more strongly when a serviceman challenges an intentional act of his superior officers.[6]

Finally, petitioner asserts (Pet. 18-22) that the court of appeals' decision conflicts with *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983). But petitioner herself acknowledges that "[t]his case is not, by any means, factually identical to *Johnson*" (Pet. 22 n.6). *Johnson* was an FTCA action by an enlisted man for injuries from an automobile accident caused by a fellow enlisted man who had become intoxicated while working with the plaintiff, while

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[5]We have sent a copy of this memorandum to counsel for petitioner.

[6]We note that while petitioner asserts (Pet. 11-12) that sexual harassment is a tort, she fails to cite any cases that so hold. In any event, even if sexual harassment is a tort, petitioner's claim would appear to be barred not only by *Feres* but by the intentional tort exception to the FTCA. 28 U.S.C. 2680(h). Similarly, petitioner's claim that military officials should have taken additional measures to combat sexual harassment is plainly barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

Petitioner also asserts (Pet. 12) that sexual harassment is unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* But Title VII does not apply to the military. See, *e.g.*, *Gonzales* v. *Department of the Army*, 718 F.2d 926, 927-929 (9th Cir. 1983); *Johnson* v. *Alexander*, 572 F.2d 1219, 1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978). The fact that Congress did not intend Title VII to apply to the military is further evidence that Congress would not have wanted claims of sexual harassment brought by servicemembers to be litigated in FTCA actions, either.

both were off duty, at a NCO Club at which liquor was served after hours in violation of military regulations and state law. The Ninth Circuit ruled that the *Feres* doctrine did not bar the plaintiff's claim that the government was negligent in permitting the NCO Club to remain open; it reasoned that the plaintiff, at the time of the negligence, "was not subject in any real way to the compulsion of military orders or performing any sort of military mission" and "was not under military control" (704 F.2d at 1439). The court concluded that "there is simply no connection between off-duty work as a bartender and the kind of military interests that the Supreme Court intended to protect in *Feres*" (704 F.2d at 1440). In this case, by contrast, Private Stubbs was on duty and, at the time of the alleged tort, directly subject to military control and discipline. Thus, petitioner, unlike the plaintiff in *Johnson*, challenges a sergeant's on-duty behavior toward a subordinate, as well as the military judgments of the sergeant's superiors in allegedly failing to prevent sexual harassment at Fort Wood. While we do not agree with the holding in *Johnson*, it is apparent that this case involves a claim that poses a far more obvious threat to military discipline.[7]

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[7]Not only is there no conflict between *Johnson* and the decision below, but petitioner is even incorrect in suggesting that the Ninth Circuit in *Johnson* applied a different test from that applied by the Eighth Circuit [illegible] the court in *Johnson*, the court below applied the *Feres* doctrine by reference to the place the tort occurred, the duty status of the plaintiff, the nature of the activity, and the impact on military discipline that the suit could cause. Compare *Johnson*, 704 F.2d at 1436-1440 with Pet. App. 6a-8a. Indeed, the court below cited its decision in *Brown* v. *United States*, 739 F.2d 362 (1984), petition for cert. pending, No. 84-636, as setting forth the correct *Feres* analysis, and *Brown* expressly relied on *Johnson* as stating the relevant factors to be considered under *Feres*. See *Brown*, 739 F.2d at 365, 367-368.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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